No. 93-226

IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

PARDEE & CURTIN LUMBER COMPANY and
THE SUN LUMBER COMPANY,
Petitioners,

v.

COUNTY COMMISSION OF WEBSTER COUNTY,
Respondent.

On Petition for a Writ of Certiorari to the Circuit Court of Webster County, West Virginia

REPLY BRIEF FOR PETITIONERS

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1. The Brief in Opposition ("Opp.") filed by the County Commission of Webster County is remarkable for what it does *not* say. The County does not dispute our showing that this Court held, in *Cumberland Coal Co.* v. *Board of Revision of Tax Assessments,* 284 U.S. 23 (1931), that it violates the Equal Protection Clause to assess property at a flat rate per acre when state law requires property to be assessed on the basis of its actual value. Indeed, the County expressly acknowledges that *Cumberland Coal* so held. *See* Opp. 6. Nor does the County question our showing that this Court reaffirmed the continuing validity of *Cumberland Coal* in *Allegheny Pittsburgh Coal Co.* v. *County Commission of Webster County,* 488 U.S. 336 (1989). In addition, the County does not challenge our showing that other state supreme courts applying *Cumberland Coal* and *Allegheny Pitts-*

burgh have struck down assessment practices like the one at issue here. *See* Pet. 20-23. Indeed, the County fails even to cite, much less confront, the conflicting authorities analyzed in the petition. Finally, the County Commission concedes that the assessment methodology struck down by this Court in *Cumberland Coal* was "similar to that used by the Webster County Assessor in this case * * *." Opp. 6. The County's sole defense is that it only plans to engage in this equal protection violation for a while.

According to the County, the same assessment practice struck down by this Court in *Cumberland Coal* may nonetheless be employed by Webster County in this case as a "transitional" mechanism. No case from this Court supports the County's assertion. The cases the County relies upon involve cyclical reappraisals—reassessing a portion of the property in a particular class on the basis of new appraisals one year, another portion the next, and so on until the entire class is assessed on the basis of actual value within a short period. Owners whose property is reassessed at the beginning of the cycle generally cannot complain that they are over-assessed compared to owners who will not be reassessed until the end of the cycle. That is what *Sunday Lake Iron Co.* v. *Township of Wakefield*, 247 U.S. 350 (1918)—relied upon by the County, Opp. 7—was about, and what this Court in *Allegheny Pittsburgh* was referring to in the passage quoted by the County. *See* Opp. 5. Indeed, this Court in *Sunday Lake Iron* expressly noted that the transitional inequity caused by the taxing authority's failure to complete a general revaluation was successfully rectified "[t]he very next year." 247 U.S. at 353.

Nothing of that sort is going on here. Here the Assessor made no attempt to assess property on the basis of actual value, incrementally or otherwise. Petitioners are not objecting that their property has been reassessed, while other property of the same class has not. The objection is simple: the County is employing an assess-

ment practice with respect to the entire class of property that this Court has found to be unconstitutional. In other words, the objection is not to a transitional inequality that comes about as a result of a *system* that will, over a short period of time, achieve general equality of treatment. The objection is instead to the inequality of treatment inherent in the system itself, where nothing about the system being employed—the flat rate system struck down in *Cumberland Coal*—will achieve equality over time. Equal treatment can come about not through the system being challenged, but only by rejecting it. The unequal treatment is therefore not "transitional" in the sense considered by this Court in *Sunday Lake Iron* or *Allegheny Pittsburgh*.

The violation of equal protection may or may not be temporary, depending on whether or not the County abandons it. But this Court has never considered it an adequate response to an acknowledged equal protection violation for the violator to assert that the violation will only last for a few years.

2. The County briefly contends that petitioners' claim is not cognizable because they failed to present evidence of the actual value of their properties. Opp. 8-9. The whole point is that the Assessor studiously refused to consider evidence of actual value, turning a blind eye to such questions as whether the property was being mined or was unmineable, barren, or mined out. *See* Pet. 4-5. The record is clear that petitioners presented abundant evidence—maps prepared by mining engineers, exhibits, and affidavits—detailing the variance in the presence of merchantable, mineable coal on property taxed as coal property. In particular, petitioners' evidence demonstrated that among the property they owned taxed as coal property were parcels containing no mineable coal. *See* Transcript of Hearing, Webster County Commission, at 138 (Feb. 21, 1990) (Sun Lumber map and exhibit), 223 (Feb. 26, 1990) (Pardee & Curtin map and affi-

davit). The record is also clear that the Assessor's adoption of the unconstitutional *Cumberland Coal* system led to an increase in Pardee & Curtin's assessment of 221 percent and in Sun Lumber's of 393 percent. Exhibit A, Petition for Appeal and Note of Argument on Behalf of Petitioners Below (Dec. 17, 1992).

The County conceded the obvious below, acknowledging that the Assessor's practice "may be unfair to those class of taxpayers who do not have coal," while "it is a terrific bargain for those who have a considerable amount of coal." Memorandum of Law and Brief of Argument on Behalf of County Commission of Webster County at 3-4, In re: 1990 Tax Assessment Cases, Circuit Court of Webster County (Feb. 26, 1992). The County cannot now claim that the record does not support the proposition that properties of different value are taxed the same. In fact, petitioners satisfied their burden of showing an equal protection violation in the same manner as the taxpayers in *Cumberland Coal*.

3. Webster County's assessment system was struck down by this Court in *Allegheny Pittsburgh* because it bore no rational relation to current market value. *See* Pet. 18-19. In response the County has adopted another system that—just like the one struck down by this Court—expressly eschews consideration of actual value. The unequal treatment inherent in that system cannot be defended as simply a transitional feature of an otherwise valid system. As this Court squarely held in *Cumberland Coal*, the system itself violates equal protection. This Court should grant the writ to enforce compliance with its holdings, and to resolve the conflict between the decision below and the decisions of state courts faithfully applying *Cumberland Coal* and *Allegheny Pittsburgh*.

CONCLUSION

For the foregoing reasons, and those in the Petition, this Court should grant the writ and reverse the decision below.

Respectfully submitted,

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